Affirmed and Opinion filed August 23, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00426-CV

LEISURE LIFE SENIOR APARTMENT HOUSING, LTD., Appellant

V.

JC FRAMING COMPANY, Appellee

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 99-38087

O P I N I O N

This is an accelerated interlocutory appeal of an order denying a motion to compel arbitration. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a) (Vernon Supp. 1999). Raising a single point for review, appellant Leisure Life Senior Apartment Housing Ltd., ("Leisure Life"), complains that the trial court's failure to compel arbitration was error because 1) the parties are bound by a valid and enforceable arbitration agreement, and 2) the claims asserted by appellee, JC Framing, fall within the scope of the arbitration agreement. For the reasons set forth below, we affirm.

BACKGROUND

In this contract dispute Leisure Life seeks relief from the trial court's denial of a motion to compel arbitration. Leisure Life owns property known as The Park at Bellaire. Leisure Life entered into a written contract with C.A. Walker Construction, Inc. ("Walker") for the construction of an apartment complex at this site. The contract contained certain provisions for arbitration and/or mediation of disputes. Subsequently, Walker entered into a subcontract with JC Framing to furnish labor for the construction project. Following completion of the work by subcontractor JC Framing, Walker failed or refused to remit sums allegedly due and payable under the agreement. JC Framing sued Walker for breach of contract, quantum meruit, foreclosure of mechanics' liens, suit on sworn account, and fraudulent inducement. JC Framing added claims against Leisure Life in an amended petition. In response, Leisure Life filed a motion to compel arbitration pursuant to language in the original agreement and certain language in the subcontract between Walker and JC Framing. We conclude there was no agreement to arbitrate between JC Framing and Leisure Life; therefore, we affirm the trial court's denial of Leisure Life's motion to compel arbitration.

STANDARD OF REVIEW

In determining whether to compel arbitration, the court must decide two issues: (1) whether a valid, enforceable arbitration agreement exists, and (2) if so, whether the claims asserted fall within the scope of the agreement. TEX. CIV. PRAC. & REM. CODE ANN. § 171.021(b), 171.026 (Vernon Supp. 2000); *Valero Energy Corp., et al. v. Teco Pipeline Co.*, 2 S.W.3d 576, 581 (Tex. App.—Houston [Dist. 14] 1999, no pet.); *Ikon Office Solutions, Inc. v. Eifert*, 2 S.W.3d 688, 693 (Tex. App.—Houston [Dist 14] 1999, no pet.). The court has no discretion but to compel arbitration if the answer to both questions is affirmative. *Valero*, 2 S.W.3d at 581; *Ikon*, 2 S.W.3d at 693.

Under Texas and federal public policy, arbitration is favored. *Jack B. Anglin v.*

Tipps, 842 S.W.2d 266, 268 (Tex. 1992). Courts must resolve any doubts about agreements to arbitrate in favor of arbitration. *Cantella & Co. v. Goodwin*, 924 S.W.2d 943 (Tex. 1996). Whether the parties have agreed to arbitrate is a question of fact to be summarily determined by the trial court. *Valero*, 2 S.W.3d at 581; *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.021(b) (Vernon Supp. 1999). When reviewing factual questions concerning an order denying arbitration, appellate courts use a "no evidence" standard. *Ikon*, 2 S.W.3d at 593; *Valero*, 2 S.W.3d at 581. In a "no evidence" point, we consider only the evidence that supports the finding, while disregarding all evidence and inferences to the contrary. *Valero*, 2 S.W.3d at 581. If there is *any* evidence of probative force to support the finding, the point must be overruled and the finding upheld. *Carlin v. 3V, Inc.*, 928 S.W.2d 291, 293 (Tex. App.—Houston [14th Dist.] 1996, no writ). Legal conclusions, on the other hand, are subject to de novo review. *Valero*, 2 S.W.3d at 582. De novo review is appropriate when the legal interpretation of the arbitration clause, and no fact issue, is before the court. *Id.* Because this case presents no question of fact, but instead an interpretation of contractual provisions, we will employ a de novo review.

AGREEMENT TO ARBITRATE

In seeking to compel arbitration, Leisure Life must prove: 1) the parties entered into an agreement to arbitrate, and 2) the claims in the lawsuit fall within the scope of the arbitration agreement. TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (Vernon Supp. 1999); *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999). The trial court may summarily decide whether to compel arbitration on the basis of affidavits, pleadings, discovery and stipulations; however, if material facts necessary to determine the issue are controverted by the opposing party, the court must conduct an evidentiary hearing to determine disputed material facts. *Jack B. Anglin v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992); *Carlin*, 928 S.W.2d at 293.

Leisure Life relies, in part, on the General Provisions, Section 4, in the original

agreement with Walker to support its contention that there is a valid and enforceable arbitration agreement. Section 4.6.1 of this Contract provides:

> [a] claim in excess of 5% of the Contract Price may be submitted to mediation in accordance with the MWBE Construction Industry Mediation Rules of the American Arbitration Association if Architect/Engineer approves such submission. All requests to submit Claims to mediation for resolution must be made prior to any party resorting to litigation.

Furthermore, Leisure Life contends JC Framing adopted the above arbitration provisions by reference. In this regard, Leisure Life relies on Paragraph 4 of the Subcontract, titled "Documents," which provides: "[t]he subcontractor shall be bound to C.A. WALKER CONSTRUCTION for all the terms and provisions of the general conditions of the specifications in the same manner that C.A. WALKER CONSTRUCTION is bound to the Owner."

JC Framing maintains that Leisure Life's claims are based on the original contract between Leisure Life and Walker and no contractual relationship between Leisure Life and JC Framing can be inferred from the language in either contract. Consequently, arbitration cannot be compelled without an agreement to arbitrate. TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (Vernon Supp. 1999); *Valero,* 2 S.W.3d at 586; *See Freis v. Canales*, 877 S.W.2d 283 (Tex. 1994) (original proceeding) (per curiam); *Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 230 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

Arbitration is a creature of contract and a clause requiring arbitration is interpreted under contract principles. *Belmont v. Lyondell Petrochemical*, 896 S.W.2d 352, 356-57 (Tex. App.—Houston [1st Dist.] 1995, no writ) (noting the presumption in favor of arbitration, but recognizing "a court may not order arbitration in the absence of such an agreement"); *Kline v. O'Quinn*, 874 S.W.2d 776 (Tex.App.—Houston [14th Dist.] 1994, writ denied) (reasoning that whether the parties agreement imposes a duty to arbitrate a particular dispute is a matter of contract interpretation and a question of law for the court). In order to have a valid agreement, the parties must have expressed an intent to be bound,

and in construing a written contract, the primary concern of an appellate court is to ascertain and to give effect to the intentions of the parties as expressed in the instrument. *R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518 (Tex. 1980); *Stinger v. Stewart & Stevenson Services, Inc.*, 830 S.W.2d 715, 719 (Tex. App.—Houston [14th Dist.] 1992, writ denied). The language of a contract will be enforced according to its plain meaning, unless such a reading would defeat the intentions of the parties. *Pepe International Development Company v. Pub Brewing Co.*, 915 S.W.2d 925, 930 (Tex. App.—Houston [1st Dist.] 1996, no writ).

Leisure Life and JC Framing dispute the meaning of the language in the respective contracts; however, an ambiguity does not arise simply because the parties advance conflicting interpretations. *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996); *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994). For an ambiguity to exist, both interpretations must be reasonable. *Columbia*, 940 S.W.2d at 589. Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered. *Id.*; *National Union Fire Ins. Co. v. CBI Industries, Inc.*, 907 S.W.2d 517, 520 (Tex. 1995); *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983). A contract is not ambiguous if it can be given a definite or certain meaning as a matter of law. *Columbia*, 940 S.W.2d at 589; *CBI*, 907 S.W.2d at 520; *Coker*, 650 S.W.2d at 393. In determining the intention of the parties, we look only to the four corners of the agreement to see what is actually stated, and not what is allegedly meant. *Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124 ,131 (Tex. App.—Houston [14th Dist.] 2000, pet. dism'd). We must consider all of the provisions with reference to the entire contract; no single provision will be controlling. *Id.* at 132. In this case, the contract terms are clear and susceptible of only one possible interpretation.

An examination of both contracts affords evidence of the parties' intentions and expressly defines their relationship. The determinative language is found in Article I of the principal contract between Leisure Life and Walker, the general contractor. Section

1.1.5 of the General Provisions provides: "[t]he Contract Documents shall not be construed to create a contractual relationship of ***any*** kind . . . between Owner [Leisure Life] and Subcontractor [J.C. Framing], or . . . between any persons or entities other than the Owner and Contractor." (emphasis added). The countervailing provision is located in the Subcontract between Walker and J.C. Framing at Paragraph 4: "[t]he subcontractor [J.C. Framing] shall be bound to C.A. WALKER CONSTRUCTION for all the terms and provisions of the general conditions of the specifications in the same manner that C.A. WALKER CONSTRUCTION is bound to the Owner." In light of these provisions, it is reasonable to believe that the parties did not expect or intend that arbitration would be an enforceable remedy as between Leisure Life and JC Framing.[1] Whether or not there is clear incorporation of the arbitration provisions from the principal contract into the subcontract between Walker and J.C. Framing, the above mentioned provisions unambiguously aver there is no arbitration agreement between Leisure Life and JC Framing. Accordingly, we should not labor to render such an interpretation against the intent of the parties when it would force the them to forgo their right of recourse in a court of law.[2]

The trial court did not specify or otherwise provide a written reason for denying the motion to compel arbitration. In addition, the record does not include a request for findings of fact or conclusions of law, and the trial court did not render any findings or conclusions. When findings and conclusions are neither requested nor filed, the trial court

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[1] If nothing in the contract can reasonably be read to require arbitration, then notions of public policy cannot be used to rewrite the agreement. *Belmont Constr., Inc. v. Lyondell Petrochemical Co.*, 896 S.W.2d 352, 356-57 (Tex.App.--Houston [1st Dist.] 1995, no writ).

[2] Where a party is to be deprived of his right to resort to the courts, it should appear that he has by agreement waived that right or consented that other instrumentalities shall be used to determine it. *Panhandle & S.F. RY. CO. v. Curtis,* 245 S.W. 781, 783 (Tex. Civ. App. – Amarillo, 1922). If no such intent exists, the court cannot utilize public policy to manufacture an agreement and thereby deprive a litigant of its right to judicial resolution of the dispute. *In re ACG Cotton Marketing, L.L.C.*, 985 S.W.2d 632, 634 (Tex. App. – Amarillo, 1999) (*citing Belmont Constr., Inc. v. Lyondell Petrochemical Co.*, 896 S.W.2d at 356-57 (noting that the "policy of resolving doubts in favor of arbitration cannot serve to stretch a contractual clause beyond the scope intended ... or allow the modification of the plain and unambiguous provisions of an agreement").

is presumed to have made all findings necessary to support its judgment. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). Such judgement must be affirmed if it can be upheld on any legal theory that finds support in the evidence. *Id.* *Any* evidence of probative force supporting a finding requires the reviewing court to uphold the finding. *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997) (emphasis added). A "no evidence" point will be sustained, however, when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. *Osteen v. Osteen*, 38 S.W.3d 809, 813 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (*citing Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). We find there is evidence to support the conclusion that no valid or enforceable arbitration agreement existed between Leisure Life and JC Framing.

We hold Leisure Life did not have a valid and enforceable agreement to arbitrate this contract dispute with JC Framing; therefore, the trial court's order denying appellant's Motion To Compel Arbitration is affirmed. Accordingly, we need not address whether the asserted claims fall within an arbitration agreement.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed August 23, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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